

Beth Wilkinson (*pro hac vice*)
Rakesh Kilaru (*pro hac vice*)
Kieran Gostin (*pro hac vice*)
Grace Hill (*pro hac vice*)
Anastasia Pastan (*pro hac vice*)
Sarah Neuman (*pro hac vice*)
WILKINSON STEKLOFF LLP
2001 M Street NW, 10th Floor
Washington, DC 20036
Telephone: (202) 847-4000
Facsimile: (202) 847-4005
bwilkinson@wilkinsonstekloff.com
rkilaru@wilkinsonstekloff.com
kgostin@wilkinsonstekloff.com
ghill@wilkinsonstekloff.com
apastan@wilkinsonstekloff.com
sneuman@wilkinsonstekloff.com

Bambo Obaro (Bar No. 267683)
Weil, Gotshal and Manges
201 Redwood Shores Parkway
Redwood Shores, CA 94065
Telephone: (650) 802-3083
Facsimile: (650) 802-3100
bambo.obaro@weil.com

Counsel for Defendant Microsoft Corp.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MICROSOFT CORP., et al.,

Defendants.

Case No. 3:23-cv-02880-JSC

**JOINT OPPOSITION TO PLAINTIFF'S
MOTION FOR PROTECTIVE ORDER**

The Honorable Jacqueline Scott Corley

1 “involved in ‘competitive decisionmaking;’ that is, advising on decisions about pricing or design
2 made in light of similar or corresponding information about a competitor.” *Id.* at 1470.

3 ARGUMENT

4 The FTC speculates that granting Defendants’ in-house litigation counsel access to trial
5 exhibits *could* result in the disclosure of Confidential information to competitive decisionmakers
6 at the company. But Defendants’ proposed protective order, Ex. A ¶ 8, expressly contemplates
7 that the individuals given access to Confidential trial exhibits are not and will not be involved in
8 competitive decision-making, and that these individuals would view the exhibits either at outside
9 counsel’s trial site or in a secure data room and sign an agreement to be bound by the protective
10 order’s terms. *See Wisk Aero LLC v. Archer Aviation Inc.*, No. 3:21-CV-02450-WHO, 2022 WL
11 6251010, at *2 (N.D. Cal. Sept. 16, 2022) (in-house counsel access permissible where, among
12 other things, the protective order contained safeguards). As set out in the attached declarations,
13 Exs. B–F, Defendants’ five designated in-house counsel have no involvement in competitive
14 decision-making and are the day-to-day managers of this litigation and legal advisors to their
15 company on the issues in this litigation. Their job responsibilities involve responding to regulatory
16 inquiries, overseeing litigation, supervising outside counsel, and managing compliance with
17 competition laws and regulations for Microsoft and Activision worldwide. These individuals
18 require access to Confidential material on the parties’ exhibits to meaningfully direct outside
19 counsel and manage this preliminary injunction proceeding.

20 The FTC’s position is especially untenable given that the FTC frequently stipulates to
21 protective orders that provide in-house litigation counsel some access to Confidential material.
22 *See, e.g., FTC v. Meta Platforms, Inc.*, No. 1:20-cv-03590-JEB, ECF No. 134 at 13 (Mar. 25, 2022)
23 (permitting disclosure of highly confidential information to two in-house counsel “with
24 responsibilities for the litigation”); *FTC v. Staples Inc.*, No. 1:15-cv-02115-EGS, ECF 63 at 4
25 (D.D.C. Jan. 10, 2016) (permitting disclosure of confidential information to designated in-house
26 counsel). Indeed, mere months ago, the FTC signed onto a protective order allowing access to
27 three in-house counsel “with responsibilities for litigation of th[e] action” in a preliminary
28 injunction proceeding in the Northern District of California. *FTC v. Meta Platforms, Inc.*, No.

5:22-cv-04325-EJD, ECF No. 80 at 5 (Aug. 24, 2022). Defendants modeled their proposed protective order on the *Meta* order, and the FTC offered no explanation whatsoever during the parties' meet and confer or in its motion as to how this matter is distinguishable. That is because no principled distinction exists.

The FTC's arguments are unavailing or beside the point. *First*, Defendants' in-house litigation counsel are not permitted to see Confidential material in the Part 3 proceeding because under FTC rules, "the Administrative Law Judge *shall issue* a protective order as set forth in the appendix to this section," and the Appendix is the "Standard Protective Order" that disallows in-house counsel access to Confidential information. 16 C.F.R. § 3.31(d) (emphasis added). Obviously, no such rule applies in federal court, and federal judges routinely recognize the need for in-house counsel to obtain access to confidential materials to direct the litigation. *See, e.g., MedImpact Healthcare Sys., Inc. v. IQVIA Inc.*, No. 19-CV-1865-GPC (DEB), 2021 WL 389820, at *4 (S.D. Cal. Feb. 4, 2021) ("Because they are not competitive decisionmakers, and because they have safeguards in place to protect against further disclosure of Plaintiffs' trade secrets and source codes, the Court finds that the *Brown Bag* factors do not support denying Ms. Nakly, Kibbe, or Katz access to any of the discovery generated in this case."); *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1469 (Fed. Cir. 1984) (seminal case holding that "status as in-house counsel cannot alone create that probability of serious risk to confidentiality and cannot therefore serve as the sole basis for denial of access"). Indeed, another district court has granted in-house counsel access to all Confidential evidence in an FTC proceeding because "[i]t would be unfair. . . for the government to attempt to prevent a private business transaction based, even in part, on evidence that is withheld from the actual Defendants (as distinct from their outside counsel)." *See FTC v. Sysco*, 83 F. Supp. 3d 1, 4 (D.D.C. 2015). The same is true here.

Second, without even knowing the identities of Defendants' proposed designees, the FTC argues that Defendants' in-house counsel are "high-ranking" and cites to inapposite caselaw denying access to a chief legal officer and executive vice president. Defendants are not proposing to designate for access its chief legal officer or any comparably senior in-house lawyer but instead is proposing to grant access to the lawyers who manage the litigation.

Dated: June 19, 2023

By: /s/ Beth Wilkinson

Jack DiCanio (Bar No. 138782)
 Caroline Van Ness (Bar No. 281675)
 SKADDEN, ARPS, SLATE, MEAGHER &
 FLOM LLP
 525 University Avenue
 Palo Alto, California 94301
 Telephone: (650) 470-4500
 Facsimile: (213) 621-5430
 Email: jack.dicanio@skadden.com
 Email: caroline.vanness@skadden.com

Steven C. Sunshine (*pro hac vice*)
 Julia K. York (*pro hac vice*)
 SKADDEN, ARPS, SLATE, MEAGHER &
 FLOM LLP
 1440 New York Avenue, N.W.
 Washington, DC 20005-2111
 Telephone: (202) 371-7000
 Facsimile: (202) 393-5760
 Email: steven.sunshine@skadden.com
 Email: julia.york@skadden.com

Maria Raptis (*pro hac vice*)
 Matthew M. Martino (*pro hac vice*)
 Michael J. Sheerin (*pro hac vice*)
 Evan R. Kreiner (*pro hac vice*)
 Bradley J. Pierson (*pro hac vice*)
 Jessica R. Watters (*pro hac vice*)
 SKADDEN, ARPS, SLATE, MEAGHER &
 FLOM LLP
 1 Manhattan West
 New York, NY 10001
 Telephone: (212) 735-3000
 Fax: (212) 735-2000
 Email: maria.raptis@skadden.com
 Email: matthew.martino@skadden.com
 Email: michael.sheerin@skadden.com
 Email: evan.kreiner@skadden.com
 Email: bradley.pierson@skadden.com
 Email: jessica.watters@skadden.com

Counsel for Defendant Activision Blizzard, Inc

Beth Wilkinson (*pro hac vice*)
 Rakesh Kilaru (*pro hac vice*)
 Kieran Gostin (*pro hac vice*)
 Grace Hill (*pro hac vice*)
 Anastasia Pastan (*pro hac vice*)
 Sarah Neuman (*pro hac vice*)
 WILKINSON STEKLOFF LLP
 2001 M Street NW, 10th Floor
 Washington, DC 20036
 Telephone: (202) 847-4000
 Facsimile: (202) 847-4005
 bwilkinson@wilkinsonstekloff.com
 rkilaru@wilkinsonstekloff.com
 kgostin@wilkinsonstekloff.com
 ghill@wilkinsonstekloff.com
 apastan@wilkinsonstekloff.com
 sneuman@wilkinsonstekloff.com

Bambo Obaro (Bar No. 267683)
 Weil, Gotshal and Manges
 201 Redwood Shores Parkway
 Redwood Shores, CA 94065
 Telephone: (650) 802-3083
 Facsimile: (650) 802-3100
 bambo.obaro@weil.com

Michael Moiseyev (*pro hac vice*)
 Megan A. Granger (*pro hac vice*)
 WEIL, GOTSHAL & MANGES LLP
 2001 M Street, NW
 Suite 600
 Washington, DC 20036
 Telephone: (202) 682-7000
 Facsimile: (202) 857-0940
 michael.moiseyev@weil.com
 megan.granger@weil.com

Counsel for Defendant Microsoft Corp.